

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs August 4, 2009

JAMES FRANCIS LORENZ v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Montgomery County
No. 39241 John H. Gasaway, III, Judge

No. M2008-02205-CCA-R3-PC - Filed February 26, 2010

The petitioner pleaded guilty to rape in December, 1961, and a jury sentenced him to life imprisonment. He now appeals the judgment of the Montgomery County Circuit Court denying post-conviction relief. The petitioner asserts that his constitutional rights were violated in 1961 when he (1) was not represented by counsel at a juvenile court hearing, (2) was not informed that he could appeal the juvenile court's decision to bind him over to criminal court, (3) was represented by ineffective counsel in criminal court, and (4) pleaded guilty involuntarily. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Crystal Myers, Assistant Public Defender, Clarksville, Tennessee, for the appellant, James Francis Lorenz.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Arthur Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

On August 1, 1961, the petitioner was arrested on a charge of rape. He was seventeen years old at the time. The juvenile court of Montgomery County transferred the petitioner

over to criminal court to be tried as an adult. The criminal court appointed two attorneys to represent the petitioner on September 26, 1961. The trial counsel requested a mental evaluation of the petitioner, and he was admitted to Central State Hospital to be evaluated. The staff at Central State found that the petitioner was not insane. The trial counsel requested a second, independent evaluation, which an army psychiatrist from Fort Campbell performed. The army psychiatrist, likewise, found the petitioner competent. On December 4, 1961, the petitioner pleaded guilty, and a jury sentenced him to life in prison. The petitioner's plea and sentence are recorded in the criminal court minutes, but the record presented to this court does not include transcripts of the proceedings.

In 1997, the petitioner filed a petition for post-conviction relief, which the court denied.¹ The petitioner appealed the post-conviction court's denial of relief. The record of the post-conviction hearing was lost in a tornado, and this court remanded the matter for a second hearing. In 1999, the court denied the petition, ruling that the statute of limitations barred the action. The Court of Criminal Appeals remanded to the post-conviction court, ordering the court to conduct a full evidentiary hearing to determine whether the petitioner was incompetent during a period of time that would have tolled the statute.

The petitioner stated the following as his grounds for post-conviction relief: (1) he was denied his right to counsel at his juvenile proceeding; (2) he received ineffective assistance of counsel; (3) he was incompetent to enter a guilty plea; (4) as a result of incompetency, the statute of limitations for post-conviction relief was tolled. In 2007, the post-conviction court heard evidence on the merits of the petition. One of the two attorneys who represented the petitioner in 1961 testified. The other attorney was deceased. Counsel testified that he represented the petitioner "in the early [sixties]." At the time, he had five years of experience in criminal law, and his co-counsel had been practicing law since either 1942 or 1946. Counsel recalled requesting two mental evaluations, the first from Central State Hospital and the second from an army psychiatrist. Both the Central State psychiatrist and the army psychiatrist found the petitioner competent. Trial counsel said that both psychiatrists "made more than a cursory examination, . . . more than the McNaughton's test. They went into whether this fellow understood the nature of the crime, and his complicity, and other than just right and wrong."

Counsel testified that he did not represent the petitioner at his juvenile court hearing. He recalled interviewing the highway patrolman who arrested the petitioner, but he did not have access to the victim. He testified that rape was punishable by death at the time, but "[t]he attorney general was going to push for 100 or 99 years." Counsel stated that he believed a ninety-nine year sentence would result in incarceration for about forty-five years.

¹The amended petition indicates a name change, identifying the petitioner as "James F. Lorenz."

A life sentence resulted in twelve and a half to thirteen years of incarceration before parole eligibility. Counsel testified that the victim's father did not want her to have to testify in a trial, so he agreed to a life sentence. The jury found the petitioner guilty and sentenced him to life imprisonment. Counsel could not recall whether "it [was] customary for a court reporter to make a complete record of the proceedings" in 1961, but he would not be surprised if a transcript or recording of the proceedings was not available. Counsel testified that he participated as a witness in a 1962 federal court proceeding where the petitioner, through an attorney, alleged "that he pled guilty under duress from his lawyers."

On redirect examination, counsel testified that he "did a cursory examination" of the juvenile court proceedings and believed there was nothing to appeal. He recalled that the petitioner was in the army but not when or if he had been discharged by the trial date. Counsel said that the jury could have sentenced the petitioner to as little as ten years, but the two jurors who spoke about the sentence wanted a higher rather than a lower sentence. Counsel did not know the nature of the federal proceeding in 1962. He had no further contact with the petitioner, who had retained private counsel.

The petitioner testified that he was born in Pennsylvania and joined the army at age seventeen. A Tennessee State Trooper arrested him on August 1, 1961 in Hickman County. He was transferred to the Montgomery County Jail. On August 3, he had a hearing in juvenile court. He was not represented by counsel, and no one testified at the hearing. Juvenile court informed the petitioner that he was being transferred to "adult court." He did not know he had a right to appeal that decision nor did he know the punishment was different in criminal court. Counsel explained to him the difference between ninety-nine years and life but not that rape was punishable by death. He recalled receiving only one visit from counsel. The petitioner testified that he was evaluated at Central State Hospital for thirty days, and the army psychiatrist evaluated him for "about two hours." The petitioner testified that on December 4, 1961, he pleaded guilty. He recalled that the district attorney read the mental evaluation from Central State into the record, and one of his attorneys entered his guilty plea. Then, "the [c]ourt . . . asked [him] directly did [he] understand the nature of the charge," to which he replied, "yes, Your Honor[.]" The petitioner said the court did not inform him of his right to trial or to confront witnesses. He did not recall counsel visiting him on the morning of the plea. He said that the patrolman who arrested him testified, but he did not remember seeing the victim.

On cross-examination, the petitioner said that he enlisted in the army because he came from a military family. He was charged with burglary in a juvenile court in Philadelphia. When the attorney general asked the petitioner whether the court in Philadelphia gave him a choice between reform school and the military, he responded, "[a]fter a second violation

[he] had no choice.” On redirect examination, the petitioner said that counsel did not warn him that the psychological findings could be used against him.

The post-conviction court noted that the petitioner was unable to present any testimony regarding his mental competency as of 1961, so the court considered “anything of a medical nature that could shed light on [the petitioner’s] competency.” The court found that the petitioner did not meet his burden of proving that he was incompetent. The court further found that (1) the petitioner did not have the right to counsel at a juvenile proceeding in 1961; (2) counsel was not deficient; and (3) the petitioner did not meet his burden of proving that he entered his guilty plea unknowingly.

Analysis

1. Standard of Review

The post-conviction judge’s findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Those findings of fact are afforded the weight of a jury verdict, and this court is bound by the findings unless the evidence in the record preponderates against those findings. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court’s conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

2. Statute of Limitations

The petitioner contends that he was incompetent from at least 1961 until the present, and such incompetency tolls the statute of limitations applicable to post-conviction relief. Furthermore, the petitioner contends that his history of mental illness renders him incompetent.

In 1986, the legislature enacted a three year statute of limitations for post-conviction petitions. Tenn. Code Ann. § 40-30-102 (1990) (repealed 1995). The petitioner had from 1986 until 1989 to file a petition in this matter, but he did not file until 1997. *See State v. St. John*, 751 S.W.2d 453 (Tenn. Crim. App. 1988) (holding that the period of limitation began to run on the effective date of the new statute of limitations, July 1, 1986). In 2000, our Supreme Court ruled that “due process requires tolling of the statute of limitations where a petitioner is denied the reasonable opportunity to assert a claim in a meaningful time and manner due to mental incompetence.” *Seals v. State*, 23 S.W.3d 272, 279 (Tenn. 2000). The post-conviction court found that the petitioner was competent. The record does not

preponderate against the post-conviction court's finding, and we are bound by the court's finding. The petitioner's claim was therefore time-barred, and the post-conviction court had no jurisdiction to hear the merits of the petition. However, the post-conviction court denied the petitioner's claim on the merits after an evidentiary hearing. Therefore, we choose to address the merits of the petition in case of further review.

3. Juvenile Court Proceeding

The petitioner argues that his constitutional rights were violated when he was not represented by counsel at the juvenile court proceeding and was not informed of his right to appeal. *Gault* established that due process requires that juveniles be informed of their rights to counsel. *Application of Gault*, 387 U.S. 1, 41 (1967). The Post-Conviction Procedure Act of 1986 allowed a petition to be based on a constitutional right that did not exist at the time of conviction if either the federal or state constitution required retrospective application of the new constitutional right. Tenn. Code Ann. § 40-30-105 (1990) (repealed 1995). The petitioner posits that *In re Whittington* allows for the retrospective application of *Gault*; however, *Whittington* was pending when *Gault* was decided, and here the order of the court was final. *See In re Whittington*, 391 U.S. 341, 344 (1968). The petitioner has not presented any other case law to show that *Gault* should be applied retroactively. The petitioner is therefore not entitled to relief on this issue.

The petitioner also argues that his constitutional rights were violated because he was not informed of his right to appeal the result of the juvenile proceeding. However, the petitioner does not present any authority to support his claim. The Court of Criminal Appeals Rule 10 requires the petitioner to present an argument, citations to authorities, and references to the record or risk waiver of the issue. Tenn. Crim. App. Rule 10(b). The petitioner merely cites to a statute that gave the petitioner the right to appeal the juvenile proceeding without any authority to support the argument that the juvenile court committed error by not informing the petitioner of this right. We, therefore, treat the issue as waived.

4. Ineffective Assistance of Counsel

The petitioner argues that he received ineffective assistance of counsel leading up to his guilty plea. Specifically, he argues that his attorneys were deficient because they did not seek to suppress his confession and did not adequately prepare for trial. The post-conviction court found that the petitioner did not establish by clear and convincing evidence that a deficiency existed that would have altered the result.

For a petitioner to successfully overturn a conviction based on ineffective assistance of counsel, the petitioner must first establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, the petitioner must show that the

deficiencies “actually had an adverse effect on the defense.” *Strickland v. Washington*, 466 U.S. 668, 693 (1984). As to guilty pleas, the petitioner must establish that, but for counsel’s errors, petitioner would not have entered the plea and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

First, the petitioner contends that his attorneys were deficient by not seeking to have his confession suppressed because a confession by an insane person is inadmissible. The post-conviction court credited counsel’s testimony that there was no legal justification for seeking to set aside the confession because two contemporary mental evaluations found the petitioner to be sane. The petitioner did not establish by clear and convincing evidence that counsel’s performance fell below the standard required by criminal attorneys and is not entitled to relief on this issue.

Secondly, the petitioner contends that his attorneys were deficient because they did not adequately prepare for a capital trial. The post-conviction court noted that counsel and the petitioner disagreed on the number of visits that counsel made to the petitioner. Counsel interviewed the arresting officer and obtained two mental evaluations. The post-conviction court credited counsel’s testimony that he advised the petitioner to plead guilty because the prosecutor would have asked the jury for either death or ninety-nine years. The petitioner did not meet his burden and is therefore not entitled to relief on this issue.

5. Guilty Plea

The petitioner argues that he entered his guilty plea unknowingly and involuntarily because the judge did not advise him of his rights. There is no transcript available of the guilty plea hearing. The United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), held that defendants must waive certain rights in order for their decision to plead guilty to be considered knowing and voluntary. These rights include the right to a jury trial, the right to confront witnesses, and the right against self-incrimination. *Id.* These rights cannot be validly waived without an intentional relinquishment, which cannot be presumed from a silent record. *Id.*

The petitioner asserts that pursuant to *Boykin*, there is reversible error because “there is no record he made a voluntary and intelligent plea.” The petitioner does not present any authority that requires *Boykin* to be applied retroactively. In fact, the Tennessee Supreme Court has ruled that *Boykin* does not apply to convictions pre-dating *Boykin*. *See State v. Frazier*, 784 S.W.2d 927, 928 (Tenn. 1990). Because the petitioner was convicted in 1961, eight years prior to *Boykin*, it is not applicable to his case. Additionally, the petitioner testified in his post-conviction hearing that the court asked if he understood the nature of the charge against him. The petitioner has failed to show his guilty plea was unknowing or involuntary, and he is not entitled to relief on the issue.

Conclusion

Based on the foregoing reasons, we affirm the judgment of the post-conviction court.

J.C. McLIN, JUDGE